44 W. R. 612. In this case, according to the view taken by the Court of Appeal, there were three contemporaneous mortgages; one of the mortgagees assigned all his interest to the mortgagor, and there was later a foreclosure. Although the fund mortgaged was insufficient to pay the mortgage debts, the mortgagor wished to share in the fund by virtue of the assignment to him, claiming that there had been no merger. The court, after noting *Toulmin* v. *Steere*, restated the doctrine of *Forbes* v. *Moffatt*, that in the absence of evidence as to intention, equity would interfere to prevent merger when it would be to the interest of the parties, though in the case before them, they found evidence of a contrary intention which defeated the claim of the mortgagor. Although the mortgages were contemporaneous, it seems the case is practically that of a mortgagor trying to hold up a past debt as a shield to an existing one. The decision is the more notable, then, for so far from following *Toulmin* v. *Steere* in extending the modification to *Forbes* v. *Moffatt*, the court tend to restrict it. The case has recently come before the House of Lords, 46 W. R. 589. The decree which the lower court had affirmed was varied on other grounds, but the statements of the law as to merger seem to have been approved. It is probable, then, that Sir William Grant's error has been wiped out by the slow processes of the law, and that *Toulmin* v. *Steere*, first doubted, then curtailed, is now practically overruled.

SALES BY AUCTION. — The fall of the hammer in a sale by auction marks the conclusion of the contract between vendor and vendee, but that contract is worthless without a memorandum sufficient to satisfy the Statute of Frauds. In the case of *Johnson* v. *Boyes*, Irish Law Times, vol. xxxii. p. 460, after the agent of the plaintiff had been declared the highest bidder at an auction, — it does not appear whether for land or goods, — the vendor interposed and instructed the auctioneer not to complete the formal record of the contract. The plaintiff, during the pendency of an action at law, made application for an interlocutory injunction to restrain a second sale. Justice Stirling denied the application. It seems he was clearly right; the claim was at best a doubtful one, and so no ground for an injunction, and the plaintiff could show no enforceable contract on which to base his rights. *Farmer* v. *Robinson*, 2 Camp. 339 (note); *Warwick* v. *Slade*, 3 Camp. 127. The infrequent *dicta* which suggest that the auctioneer's authority to make the memorandum cannot be revoked after the hammer has fallen, are merely attempts to evade the statute.

The question naturally arises whether the disappointed vendee has a cause of action against the auctioneer. Probably no court would spell out a contract, that the auctioneer promised that his authority would not be revoked. Nor does it seem possible that the vendee could sue the auctioneer in tort on the ground that he has not done his duty as the vendee's agent. It is true it has been held that a memorandum of sale written by an auctioneer is a memorandum by an agent of the vendee and so sufficient to satisfy the Statute of Frauds, but the agency which the law sees imposes no duty to make a memorandum. It is clear, from the language of the cases, that it amounts merely to this, — that the vendee, by a nod or a lift of his hand, permits the auctioneer to sign the memorandum for him. *Emmerson* v. *Heelis*, 2 Taunt. 38: *Bird* v. *Boulter*, 4 B.

& Ad. 443; *Gill* v. *Bicknell*, 2 Cush. 355, 358. To shift the hardship of the statute from the parties to the contract to their go-between, the auctioneer, would be to disregard principle and serve no business interest.

THE CONSIDERATION IN COMPROMISES. — It is an accepted rule of law that a forbearance to sue may be a good consideration to support a contract. It is equally accepted that if the claim forborne is unreasonable and dishonest, the contract is unenforceable on grounds of public policy. The case of a claim reasonably disputed recently arose in New York. *Cox et al.* v. *Stokes et al.*, New York Law Journal, Oct. 15, 1898. In that case the respondents had promised the appellants to perform a railroad reorganization agreement, the consideration for that promise being that the appellants, the reorganization committee, should discontinue litigation pending against the respondents. The court held that this forbearance to press a disputed claim was good consideration.

This decision represents the law in almost all jurisdictions. *Cook* v. *Wright*, 1 B. & S. 559; *White* v. *Hoyt*, 73 N. Y. 505. Whether the claim is reasonable, or unreasonable but *bona fide*, would seem to make no difference in principle; for the claim is in each case actually invalid, and the better authority holds that a forbearance to sue in each case is a good consideration. *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Prout* v. *Pittsfield Fire District*, 154 Mass. 450. To determine upon principle whether in either case the consideration is valid, involves a questioning of the accepted theories of consideration. The most scientific hypothesis ignores the benefit to the promisor and fastens upon the detriment to the promisee. But it limits detriment to legal detriment, — doing or refraining in any case whatever when the promisee had a legal right to adopt a contrary course. To apply this test in the case of compromise — can a court say that it is a legal detriment to forbear from pursuing a claim which in fact is invalid? A Mississippi court has been logical enough to decide that in such case there is no consideration, and indeed no other conclusion seems possible, if the theory of legal detriment be held. *Gunning* v. *Royal*, 59 Miss. 45.

That theory, however, is found to fail elsewhere in the law of contract. Where a debtor compounds with his creditors, where a promisee gives a consideration which he is already obliged by contract to perform, and where one innocently performs a tort at request, good considerations are found which could never be by the theory of legal detriment. The just result reached in all of these cases seems to point to a broader test of *prima facie* consideration than that of legal detriment — the test of actual detriment. There are many grounds of public policy which make *prima facie* obligations unenforceable. Such a rule of policy of broad application is the legal detriment rule itself, and the error which leads to its adoption as a basis of consideration instead of a secondary rule in regard to the enforcement of contracts is thus explained. In the present case the evident policy of the modern law to favor business compromises as an escape from litigation prevails, and the *prima facie* obligation supported by an actual detriment is undisturbed. But the fact remains that in such a case there is no legal detriment, and it can be explained upon no narrower conception of *prima facie* consideration than actual detriment — any act, forbearance, or promise given by the promisor at the request of the promisee.